ELLIOTT COAL PARTNERS, LTD.

IBLA 87-305 Decided February 8, 1999

Appeal from a decision by Administrative Law Judge Frederick A. Miller finding Notice of Violation No. 81-2-30-4 and Cessation Order No. 81-2-30-3 were validly issued. Docket No. NX 1-112-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

   When evidence presented at a hearing supports a conclusion that a signature on an application was authentic, an administrative law judge does not abuse his discretion in refusing to leave the hearing record open so that the opinion of a handwriting analyst could be obtained.

2. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

   The party named in a permit is a proper party to be issued a notice of violation. Although properly served with an NOV, a party listed as the permittee in state records may show that it is not responsible for compliance. A named permittee will not be held responsible for violations which it did not cause when, at the time of the violations, it held no legal rights to the area and was not associated with the party disturbing the area.

APPEARANCES: John Hudson, Esq., Oklahoma City, Oklahoma, for Elliott Coal Partners, Ltd.; Gerald A. Thornton, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Elliott Coal Partners, Ltd. (Elliott), has appealed a decision of Administrative Law Judge Frederick A. Miller dated January 23, 1987, finding that Notice of Violation (NOV) No. 81-2-30-4 and Cessation Order (CO) No. 81-2-30-3 were validly issued to Elliott for violations on land subject to Kentucky surface disturbance mining Permit No. 064-0003. Rejecting Elliott's argument that its agent, Carl B. Kendrick, had not signed the application for the permit, Judge Miller found that the permit was validly issued to Elliott. He also found that there was no evidence that the permit had been assigned and concluded that Elliott was the proper party to have been issued the NOV and CO. He also rejected Elliott's argument that it was not responsible for the violations because unknown persons had mined the site and caused the conditions that were cited.

On November 7, 1989, we suspended consideration of this appeal pending conclusion of a state administrative proceeding in Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet v. Elliott Coal Partners, Ltd., File No. 2824-VII-05, concerning Permit No. 064-0003. We did so because that proceeding involved the issue of whether the state had improperly issued the permit to Elliott based on a forgery of Kendrick's signature.

On October 7, 1995, counsel for Elliott filed a status report stating that no date had yet been set for an administrative hearing in the Kentucky proceedings.

On June 24, 1997, counsel for Elliott filed a further status report stating that the matter had been assigned to a hearing officer and the parties ordered to appear on July 14, 1997, to show cause why the case should not be dismissed for failure to prosecute. Counsel stated further that the Kentucky Natural Resources and Environmental Cabinet (Kentucky Cabinet or Cabinet) had been involved in hearings on the constitutionality of its procedures and that it had a "tremendous backlog of cases that had to be retried." See Franklin v. Natural Res. & Env. P. Cab., 799 S.W. 2d 1 (Ky. 1990). Counsel asked the Board to defer action on the appeal until the Cabinet "has held a hearing and ruled on the matter."

On July 23, 1997, the Cabinet hearing officer issued an order recommending that the Kentucky proceeding be dismissed without prejudice for failure to prosecute.

In an October 6, 1997, Order we noted that the Cabinet hearing officer had issued the recommended order and requested Elliott "to inform us whether it wishes us to vacate our November 7, 1989, Order suspending consideration and decide this appeal on the record presently before us. If there is no response to this Order, we will assume Appellant does not wish to pursue its appeal and dismiss it."

On October 28, 1997, counsel for Elliott notified us that Elliott wished to pursue the appeal and desired us to decide the matter on the

record presently before us. Counsel for Elliott also stated that he had advised counsel for the Office of Surface Mining Reclamation and Enforcement (OSM) of Elliott's intent to proceed with the appeal. Counsel provided no new information as to the status of the Kentucky proceeding, and we assume the Secretary of the Kentucky Cabinet signed a final order based on the hearing officer's July 23, 1997, report and recommendation. Under the circumstances we will decide the appeal on the record presently before us.

NOV No. 81-2-30-4, citing Elliott for three violations of the surface mining regulations, was issued by Inspector Clive G. Hall following an inspection conducted by him March 26, 1981. (Ex. R-1.) 1/ Hal reinspected on April 9, 1981, and terminated violation 1 because it had been corrected. He modified violation 2 by extending the abatement period until May 26, 1981, because Brad Runyon said he needed more time to reclaim the access road. (Ex. R-2.) On May 26, Hall extended the abatement time for violations 2 and 3 until June 26 because the "[o]perator [was] having a difficult time with his sub-contractor." (Application for Temporary Relief at 2 and Ex. D.) On June 25, 1981, Hall issued CO No. 81-2-30-2 because violations 2 and 3 had not been corrected. (Ex. R-3.)

Elliott raised the issue of its responsibility for the violations in its application for review of the cessation order, filed on July 1, 1981. In its application for review, Elliott contended that all operations at the site had been conducted by Bradford Runyon "pursuant to a total assignment of the coal lease and subject permit" and that Elliott had "no control of the acts or omissions of the assignee." Elliott's application for temporary relief filed July 3, 1981, repeated these statements. (Application for Temporary Relief at 2.)

The issues in this appeal do not concern facts related to the violations for which the NOV and CO were issued. In the opening statement at the hearing, counsel for Elliott noted that the company "was not contesting the fact that these violations occurred." (Tr. 11.) Subsequently, counsel for the OSM requested, and Judge Miller granted, a ruling that OSM had established a prima facie case. (Tr. 13-14.) See 43 C.F.R. § 4.1171; Coal Energy, Inc. v. OSM, 105 IBLA 385, 387-88 (1988). As a result of this ruling, the evidence presented at the hearing concerned Elliott's defense that it did not sign the permit application and was not a proper permittee because the permit was wrongfully issued by the Commonwealth of Kentucky. (Tr. 5, 11-12.) Although this issue is not directly argued on appeal, it provides the background for the arguments that are raised by the parties.

1/ The NOV cited Elliott for (1) failure to pass all drainage through a sedimentation pond in violation of 30 C.F.R. § 715.17(a); (2) failure to maintain the access road in violation of 30 C.F.R. § 715.17(l)(3); and (3) failure to eliminate a highwall and surface depressions in violation of 30 C.F.R. § 715.14(b)(ii). (Ex. R-1.)

On appeal, Elliott contends that the Judge erred in denying Elliott's motion to have the permit application produced for inspection by a handwriting expert and in failing to leave the record open following the hearing to afford Elliott the opportunity to obtain a handwriting analysis in support of its argument that the signature appearing on the permit application was a forgery. (Statement of Reasons (SOR) at 8, 12-14.)

The procedural history of this case in the Hearings Division is helpful in considering the issue of whether Judge Miller committed material error in failing to act on Elliott's motion to have OSM produce the permit application for inspection prior to the hearing.

A notice of hearing on the application for review and the application for temporary relief was issued by Administrative Law Judge David Torbett on July 29, 1981, but was continued for 90 days in response to a joint motion by the parties. On August 19, 1981, Elliott filed a motion to add Runyon as a party, contending that he was the operator at the site and had executed a "hold harmless" agreement with Elliott covering his actions on the permit. This motion was "overruled" in a one-sentence order issued by Judge Torbett on February 25, 1982.

The continued hearing was not rescheduled until August 9, 1984, when a notice issued by Administrative Law Judge Miller established a hearing date. 2/ Elliott states that by agreement of the parties the hearing was not rescheduled due to pending State proceedings on the same matter and issues. (Applicant's Post-hearing Brief at 9; SOR at 2-3; Reply at 5.) OSM has not disputed this assertion. Elliott moved to further continue the hearing because, in the interim, the Kentucky Cabinet had begun proceedings in which Elliott was asserting that the permit had been wrongfully issued in Elliott's name in that "no agent, officer, or employee of Elliott Coal Partners, Ltd., signed or authorized said permit and therefore, that they are not the permittee nor operator on said permit." Motion to Continue dated August 22, 1984, at 1. OSM did not oppose the motion and the hearing notice was vacated.

By notice dated March 24, 1986, a hearing was set for April 22, 1986. By order dated April 17, 1986, the hearing date was rescheduled for May 22, 1986, to allow Elliott time to obtain documents required by a subpoena served by OSM.

Elliott then filed two motions. First, on April 17, 1986, Elliott moved to amend its application for review to allege, in conformance with the position taken in the state proceedings, that "[a]ll mining operations on the subject surface disturbance permit were conducted by Bradford Runyon * * * pursuant to a permit that was issued in [Elliott's] name through

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2/ For reasons not shown by the record, Elliott's application for temporary relief was not acted upon in the interim or included in Judge Miller's notice of hearing.

the fraudulent actions and forgery on the part of said Bradford Runyon," repeating that Elliott had no control over Runyon's acts or omissions at the minesite. (First Amended Application for Review at 1.) The amended application also asserted that under the doctrine of primary jurisdiction the question of wrongful issuance of the permit should be resolved by the Commonwealth of Kentucky and again requested that the hearing be stayed pending a resolution of the question.

Elliott's second motion, filed on April 29, 1986, and based on the allegation of forgery, was that "OSM produce for inspection by [Elliott's] expert witness the original of all documents filed with the Kentucky Cabinet * * * pertaining to permit 64-0003, including, but not limited to, the application for said permit and the reclamation bond filed for said permit." The motion stated that OSM had "access to these documents and can obtain them from the Cabinet" and requested an order requiring OSM "to produce the originals of the above permit documents to [Elliott] or [Elliott's] designated expert on or before May 9, 1986."

Neither motion was ruled on before the hearing. The hearing date, however, was again extended, with the consent of OSM, due to the difficulty of witnesses obtaining return airline flights over the Memorial Day weekend. Elliott's May 5, 1986, motion for the continuance noted that its motion "concerning the handwriting analysis has not been ruled on and this is necessary for a final adjudication." On May 6, 1986, Judge Miller issued an order setting the hearing for July 15, 1986.

Responding to Elliott's April 29, 1986, motion, counsel for OSM informed counsel for Elliott that OSM did not have the originals and they would have to be obtained from the Kentucky Department of Natural Resources (now the Kentucky Cabinet). (Tr. at 4.) The Kentucky Cabinet informed counsel for Elliott that it refused to let the documents leave its offices. (Tr. at 5.) Counsel for Elliott apparently made no further effort to obtain the documents before the hearing.

At the outset of the July 15, 1986, hearing Judge Miller granted Elliott's motion to amend the application for review. (Tr. 3-4.) He then asked whether "a motion filed by the applicant [Elliott] to require the production of a witness or witnesses to disclose certain information" was ever addressed. (Tr. at 4.) Counsel for OSM explained it was actually a motion in which counsel for Elliott "asked me to produce original documents from the state" and reported that he had told counsel for Elliott "that we could not produce the originals * * * [t]hat the originals would have to be required from the state." (Tr. at 4.) Counsel for Elliott stated that his wish was to have Kendrick's signature on the permit application compared to other contemporary signatures by him in case an issue of authenticity arose but that the Cabinet would not allow the document to leave its offices. "If this becomes an issue in the case, it may be important at the conclusion of the case for something to be done if there is conflicting testimony about the signature," counsel stated. (Tr. at 5.) Judge Miller asked Elliott's counsel "[w]hy did you not ask me for a subpoena before now? I

will get that document by subpoena, but not at this point." "Our motion was to have that document sent to our expert," counsel replied. "Well," Judge Miller responded, "you both agreed that [the] Kentucky Cabinet was not going to part with it. Therefore[,] you should have taken another avenue." (Tr. 6.) 3/

At the conclusion of the evidence counsel for Elliott renewed its motion that the original of the permit application be sent to an expert for handwriting analysis and requested "an order setting forth the terms on how this could be done." (Tr. 173-74.) Judge Miller denied the motion because the document had not been requested prior to filing the motion on April 29, 1986, and it was "tactics to ask for it now." (Tr. 177.) In response to Elliott's counsel's statement that "we have been deprived of one of our main defenses in this case," Judge Miller stated: "You may argue that in the brief, if you wish. Is that what you want to do?" (Tr. at 179.)

In its post-hearing brief, Elliott argued that its motion for production of documents was not dilatory and that it would "be denied the opportunity to present its case * * * if the previous Order overruling is not reconsidered and the record left open on whatever terms the Administrative Law Judge deems appropriate for * * * handwriting analysis and testimony." (Applicant's Post-Hearing Brief at 9.)

In his decision, Judge Miller stated that Elliott "argues that it was prejudiced by the failure of the Court to rule on its motion [for production of documents] prior to hearing." (Decision at 2.) Judge Miller ruled:

> Pursuant to 43 CFR § 4.1140, a request for production of documents may be served on any party without leave of the administrative law judge. If the party upon whom the request is served fails to adequately respond, the discovering party may move for an order compelling discovery ([43] CFR § 4.1135). In this instance, counsel for the applicant failed to serve upon respondent a request for production of documents, which is a prerequisite to a motion to compel discovery. Therefore the applicant's motion for a further continuance is denied.

Id.

The arguments on appeal concern two matters. First, the parties disagree about the nature of the motion Elliott filed on April 29, 1986. Neither, however, supports the suggestion in Judge Miller's decision that

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3/ Judge Miller denied Elliott's motion made at the outset of the hearing that repeated its request that the proceeding be stayed pending resolution of the Kentucky proceedings, in part because "this case has the distinction of being the oldest case on the hearings docket in this country." (Tr. 7-8.)

the motion was a motion to compel. Rather, Elliott states that it asked the Judge to order OSM to obtain the permit application because the scheduled hearing was to occur sooner than the 30 days allowed by 43 C.F.R. § 4.1140 to respond to a motion to produce and that a request for production would have done little good. (SOR at 12-13; Reply at 5.) OSM contends that Elliott's motion was a request to produce and that, because Elliott failed to file to compel production under 43 C.F.R. § 4.1135, "[t]here was no motion before the ALJ requiring a ruling." (OSM Brief at 10.)

The second matter in dispute is who should be held responsible for the fact that the permit application was not obtained prior to the hearing and, consequently, whether the Judge committed material error by not leaving the record open to obtain a handwriting analysis. The original of the permit application was brought to the hearing by Marvin Shaw, Assistant Director for the Division of Permits of the Cabinet. (Tr. 14, 18.) Although OSM did inform Elliott that it did not have the documents requested in Elliott's April 29, 1986, motion, Elliott argues that OSM failed to file a formal response to its motion and that, having failed to rule on its motion, it was improper for the Judge to charge Elliott with dilatory tactics and that the failure to leave the record open, as requested both at the hearing and in its post hearing brief, was error which deprived it of its ability to fully present its case. (SOR at 13; Posthearing Brief at 7-9; Tr. 174.) OSM contends that, given the time Elliott had to obtain the document, the Judge did not err in refusing to allow Elliott to supplement the record. (OSM Brief at 11-12.) 4/

The briefs attempt to assign fault by citing and applying the regulations governing procedure and discovery in surface coal mining hearings. As indicated in Judge Miller's decision, 43 C.F.R. § 4.1140 allows requests for production of documents to be served "without leave of the administrative law judge." Although Elliott's motion was served on OSM, the Judge's decision does not regard it as a request for production under the regulation. It seems clear that, at the time the request for OSM's production of the original permit application was filed, it was Elliott's opinion that the documents were in the "control of the party upon whom the request [was] served." 43 C.F.R. § 4.1140(a)(1).

4/ OSM also argues that Elliott could have obtained the document through the State proceedings. See Reply at 12; Respondent's Posthearing Brief at 9. Elliott argues that at the time of the hearing, as well as the appeal to this Board, the State proceedings had not reached the merits of the case. Kentucky sought to have each of the limited partners held individually liable for the violations. The Kentucky hearing officer dismissed the limited partners as parties, but this ruling was reversed by the Secretary of the Kentucky Cabinet. (SOR at 3.) Elliott then appealed the Secretary's decision to the Franklin Circuit Court.

It is clear from his decision that Judge Miller did not consider the motion filed with him as a motion to produce under 43 C.F.R. § 4.1140. However, the fact that Elliott did not file a motion to produce is unrelated to the failure to rule on the motion which was filed. Likewise, even though the motion did not contain the information required of a motion to compel (see 43 C.F.R. § 4.1135), had Elliott denominated it a motion to compel, or had the Judge regarded it as such at the time, the motion should have been ruled upon. The lack of a prior motion to produce would have justified denying the request but does not justify leaving the motion unaddressed.

Alternatively, if we were to accept OSM's position that Elliott's motion was a motion to produce, the decision was clearly wrong in stating that such a request was not served. 5/ The record indicates that at the time OSM viewed the motion as a motion to produce. (Tr. at 4.) Counsel for both sides discussed the matter with one or more representatives of the Kentucky Cabinet. (Tr. 4-5.) Although OSM's position does explain why Judge Miller did not issue a ruling, it does not explain why OSM did not take further action on the motion. Once counsel for OSM knew that the agency could not obtain the original permit application, the appropriate action would have been to inform the Judge by opposing the motion. Nor does the Cabinet's refusal to release the document to either Elliott or OSM explain why a written response was neither served on Elliott nor filed with the Judge. 43 C.F.R. § 4.1140(d). Had the Judge also regarded the motion as a motion to produce, until notified otherwise he could have reasonably assumed that OSM had no objection to producing the document, had access to it as stated in the motion, and would deliver it to Elliott. 43 C.F.R. §§ 4.1112(c), 4.1140(e)(1).

The broader procedural history of the case does not suggest a proper resolution. Although the proceedings have indeed been protracted, the delay appears to have been by mutual agreement of the parties, with approval of the Administrative Law Judges in charge of the case. In 1981 the hearing was continued by the Administrative Law Judge, based on a joint motion by the parties. Although, as OSM points out, Elliott asserted its forgery defense in the State proceedings in 1983 and could have amended its application thereafter, at that time no hearing was scheduled. No hearing was scheduled until 1984 and Elliott's motion for a further continuance was not opposed, and was apparently agreed to, by OSM. No date was specified in the continuance and a new date was not set until the order of March 24, 1986, scheduled a hearing for April 22, 1986. Before March 1986, neither party had filed any motions relating to preparation for a hearing.

5/ It is also unclear why Judge Miller's decision referred to a "continuance" except insofar as leaving the record open for a handwriting analysis would have extended the proceedings. Counsel for Elliott was explicit about the limited nature of the request, outlining a procedure by which the document could be examined by an expert and a deposition taken. (Tr. 174; see also Posthearing Brief at 7-9.)

Elliott's attorney received the hearing notice on March 27, 1986. The hearing, however, was once again rescheduled. The reason was that OSM's subpoena, calling for three documents, two of which were described by reference to Elliott's 1981 applications for review and for temporary relief, had not been received by Elliott until April 15, 1986, a week before the scheduled hearing date.

The day after the hearing was rescheduled Elliott moved to amend its application for review, asserting forgery and requesting that the hearing be stayed pending resolution of State proceedings. See 43 C.F.R. § 4.1168(a). OSM did not respond to the motion; nor was a ruling issued granting or denying leave to amend. Consistent with the claim of forgery asserted in its proposed amended application, Elliott next filed its discovery motion. Again, no response was filed and no ruling was issued.

The record does not indicate why formal action was not taken on Elliott's motions by either OSM or the Judge. Nor does it indicate why counsel for Elliott did not request the Judge to grant its motions when OSM did not respond and no ruling was forthcoming. Both parties seem to have followed the common practice of not filing motions, conducting discovery, or taking other steps to prepare for the hearing until fairly certain that a hearing would actually take place. Further action on the motions may have seemed unnecessary when the hearing date was only a few weeks away. However, after May 6, when the hearing had been continued until July 15, whatever reasons there were for not proceeding formally on the pending motions no longer applied and some action should have been taken by counsel for both sides. None was. In the meantime, Elliott's motions remained on file without a ruling by Judge Miller. 6/

It was the responsibility of all parties to take action as called for in the regulations governing the procedural conduct of a case. Rather than filing a request and then filing a motion to compel when OSM did not respond, Elliott initiated its action with a document more akin to a motion to compel. Elliott sought documents by serving a motion to produce on OSM. The documents were not in OSM's possession, and OSM advised Elliott of this fact. Having learned this, Elliott could have sought to have the Cabinet deliver the documents to the Administrative Law Judge for its examination. It did not do so. If it had done so and the Cabinet refused, Elliott could then have asked for an order compelling production. Under the circumstances, when Elliott did not ask Judge Miller to direct the Commonwealth to produce the documents before the hearing, Judge Miller

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6/ As indicated above, at the outset of the hearing Judge Miller was not familiar with the nature of the request set out in Elliott's discovery motion. (Tr. 4.)

did not err in denying the motion after the hearing had started. However, this conclusion does not resolve the issue whether the Judge erred in not leaving the record open to allow Elliott an opportunity to have the permit application examined by a handwriting expert. That is an entirely different question.

In an appeal from a decision of an Administrative Law Judge, an appellant has the burden of showing that the decision was erroneous. Roblee Coal Co. v. OSM, 130 IBLA 268, 276 (1994). Judge Miller's decision states:

> At the hearing, the court heard evidence as to the authenticity of Mr. Carl B. Kendrick's signature on the permit application. Mr. Kendrick, the agent for Elliott, testified that he did not sign the permit application and that the permit was issued without his knowledge or consent. Other evidence indicates that Carl B. Kendrick signed the permit application and knew that the permit was issued to Elliott. In particular, Glenna Maggard Smith, a secretary at Morgan Energy and a commissioned notary public for the state-at-large, testified that she notarized the signature of Carl B. Kendrick on the permit application (Tr. 132, Exh. A-1). Pursuant to KRS [Kentucky Revised Statutes] 423.130, a notary who takes an acknowledgement certifies that the person executing the instrument appeared before the notary or provided satisfactory evidence of identity. Although Carl B. Kendrick denied that he signed the permit application, Ms. Smith testified that she never notarized Kendrick's signature unless he signed the document in her presence, and that she never notarized a signature by anyone other than Kendrick who signed as Kendrick (Tr. 133). Ms. Smith also stated that Kendrick's signature varied from time to time (Tr. 137).

(Decision at 2.)

At the hearing, notary public Glenna Smith testified:

> Q. [By Mr. Hill, counsel for OSM]: In January of 1979 were you a county notary public?
>
> A. Yes.
>
> Q. Did you perform notarization duties for Morgan Coal Company, Morgan Energy?
>
> A. Yes.
>
> Q. Did you ever have an opportunity to not[a]rize the signature of Mr. Carl Kendrick?
>
> A. Yes.
>
> Q. Are you personally acquainted with Mr. Carl Kendrick?

A. Yes.

Q. Is Mr. Kendrick sitting over here?

A. Yes.

Q. I show you what has been marked as Applicant Exhibit 1 which is a permit granted by the [C]ommonwealth of Kentucky for a surface mining permit. I show you page 15, item four[,] there is a signature of, which purports to be Carl B. Kendrick and it has been not[a]rized by Glenna J. Maggard, is that your signature?

A. Yes.

Q. Did you not[a]rize that signature of Carl B. Kendrick?

A. Yes.

Q. Was Mr. Kendrick present when you not[a]rized that?

A. Yes.

Q. Did you ever not[a]rize any documents for Mr. Kendrick when Mr. Kendrick did not personally sign it in front of you?

A. No.

Q. Did you ever not[a]rize any signatures by someone other than Mr. Kendrick who would sign their name as Mr. Kendrick?

A. No.

Mr. Hill: No further questions.

(Tr. 132-33.)

[1] Based on this testimony and the documents in evidence, we conclude Judge Miller could reasonably make a factual determination that the signature on the application was authentic. He could also reasonably conclude that further evidence on the issue of whether the signature on the application was authentic was not necessary. 7/ We conclude he did not abuse his discretion by refusing Elliott's counsel's request to leave the hearing record open so that the opinion of a handwriting analyst could be obtained. 8/

7/ See United States v. Hobson, 142 IBLA 7, 13-14 (1997).

8/ Counsel for Elliott might have sought certification of Judge Miller's denial of her motion that the permit application be sent to a handwriting expert for analysis. See 43 C.F.R. §§ 4.1124; 4.1272.

The other argument Elliott raises on appeal is based on the following testimony given by Runyon during cross-examination:

Q. When you say that you mined the J. Jordan property, who actually mined it?

A. I mined it myself personally on the start, reclaimed all the mine[.]

Q. Who else mined on J. Jordan?

A. I do not know.

Q. Have you been out to the property recently?

A. You mean on the hill?

Q. Yes.

A. I would say it has been a couple of years.

Q. If I understood your testimony, do you mean that someone else besides yourself mined out there?

A. They did more mining there since I mined.

Q. Do you know who did that?

A. No sir.

* * * * * * *

Q. If I understood your testimony you said that you reclaimed everything that you disturbed?

A. That is 100 percent correct.

Q. And you do not know who else mined on the property?

A. No, I would not want to go on record to say that I did. I will bring this up, about two years ago there were some people out there that were starting to mine on the same property and the state came in and stopped them on the J. Jordan property.

Q. When you say that you mined personally, you are not talking about any of your corporations?

A. That was B and T Coal.

Q. That is the corporation that you are the sole stockholder?

A. Yes.

Q. You do not contend Mr. Runyon that Mr. Kendrick or Mr. Love, or one of their companies mined that property after you did, do you?

A. I am sure they did not. I feel sure they did not.

(Tr. 149-50.)

In its posthearing brief at 5-6, Elliott argued that this uncontradicted testimony established "that an unknown and unauthorized operator was responsible for the subject violations" and "that Applicant's authorized operator, Brad Runyon, had completely reclaimed his operation prior to this wildcat operation." Judge Miller rejected this argument:

> Mr. Runyon did testify that approximately two years prior to the July, 1986, hearing date, certain persons were starting to mine the site (Tr. 150). Mr. Runyon's testimony establishes that some unauthorized mining began in 1984, but does not establish that a wildcat operator created the conditions that lead to the issuance of the notice of violation and cessation order in 1981 (emphasis supplied).

(Decision at 3.) Elliott renews its argument on appeal, contending that under Bell Coal Co. v. OSMRE, 81 IBLA 385 (1984), it cannot be held responsible for unauthorized mining which occurred without its consent or knowledge. (SOR at 9-10.)

[2] The rules governing the responsibility of a permittee for violations occurring on the permitted area are not in dispute. An NOV is issued under section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 which provides that "[w]hen, on the basis of a Federal inspection" OSM "determines that any permittee is in violation of any requirement" of the Act, it "shall issue a notice to the permittee or his agent." 30 U.S.C. § 1271(a)(3) (1994) (emphasis supplied). The party named in a permit "is a proper party to be issued a notice of violation." Wilson Farms Coal Co., 2 IBSMA 118, 122, 87 I.D. 245, 247 (1980). Although properly served with an NOV, a party listed as the permittee in state records may show that it is not responsible for compliance. A named permittee will not be held responsible for violations which it did not cause when, at the time of the violations, it held no legal rights to the area and was not associated with the party disturbing the area. Marco, Inc., 3 IBSMA 128, 133, 88 I.D. 500, 502 (1981); see Clark Coal Co. v. OSM, 102 IBLA 93, 97 (1988); Bell Coal Co., supra at 394; Wilson Farms Coal Co., supra.

We agree with Judge Miller that Runyon's testimony does not establish that the violations at issue were the responsibility of an unknown operator. Elliott's argument assumes that Runyon's statement that he

reclaimed the property refers to a time prior to March 1981 when the NOV was issued. See Posthearing Brief at 5. In fact, there is no indication in the record as to the date Runyon had in mind when stating that he completed reclamation. Neither the immediate line of questioning nor the remainder of Runyon's testimony provides any temporal reference for his statement. Absent such a basis in the record, Runyon's testimony does not establish that the site was reclaimed prior to the mining begun by the unknown party, whether that mining occurred in 1984 or in 1981. More to the point, it does not establish that the site was reclaimed prior to the issuance of the NOV and, therefore, does not establish Runyon's lack of responsibility for the violations cited.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision of the Administrative Law Judge is affirmed.

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Will A. Irwin
Administrative Judge

I concur:

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R.W. Mullen
Administrative Judge